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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

LESLIE S. OSBORNE, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF GLOBAL VENDING, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit, by affirming the district court's summary dismissal of the bankruptcy trustee/petitioner's Verified Claim of Ownership and Request for Ancillary Hearing, violated established precedent governing summary dismissal of an action and thereby obviating constitutionally protected due process guarantees.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE

Petitioner, LESLIE S. OSBORNE is the court-appointed trustee ("Trustee") for the Bankruptcy Estate of Global Vending, Inc. ("Estate") and files this petition in his capacity as the Trustee of the Estate.

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By affirming the district court's summary dismissal of the petitioner's statutorily Verified Claim of Ownership and Request for Ancillary Hearing, the appellate court ratified the unconstitutional taking of a third parties' interest in property without allowing the petitioner to present evidence that the property was not subject to forfeiture, thereby violating the U.S. Constitution's guarantee of due process of law and violated well established, binding precedent.

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USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), Eleventh Circuit Court of Appeal, Case No. 06-12715, dated October 10, 2007

USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), United States District Court, Southern District of Florida, Case No. 04-60107-CR-MGC, dated April 20, 2006.

Verified Claim of Ownership and Request for Ancillary Hearing filed in USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), United States District Court, Southern District of Florida, Case No. 04-60107-CR-MGC, dated March 29, 2005.

Special Jury Verdict on Forfeiture filed in USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), United States District Court, Southern District of Florida, Case No. 04-60107-CR-MGC, dated February 11, 2005.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, LESLIE S. OSBORNE, as Trustee ("Trustee") for the Bankruptcy Estate of Global Vending, Inc. ("Estate"), respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 10, 2007. The Eleventh Circuit affirmed the summary dismissal of a timely filed petition under 21 U.S.C. § 853 thereby sustaining a forfeiture judgment of the United States District Court for the Southern District of Florida which allowed the United States of America ("USA") to seize approximately $1.1 million in funds ('the Funds") indisputably owned by Global Vending, Inc. ("Global") (and by operation of law, the Estate, post-bankruptcy), even though (i) Global was not a defendant in the underlying criminal action against Global's owner and president, Thomas Foley, III. ("Foley"); (ii) the Trustee's Verified Claim of Ownership and Request for Ancillary Hearing ("Verified Claim") properly set forth a legitimate and lawful claim to the Funds; and (iii) the Special Jury Verdict on Forfeiture ("Special Verdict") fails on its face to forfeit the Funds. The district court, without granting the Trustee the right to produce evidence, granted the USA's motion to dismiss the Trustee's Verified Claim even though the Verified Claim alleges all necessary elements of an valid claim.

The Eleventh Circuit rendered its decision on October 10, 2007 and found that it was required to affirm the district court's order because the Trustee had failed to meet his burden of proving by a preponderance of the evidence that the Funds as of the time

of their seizure by the FBI were owned by Global. App.4. The Eleventh Circuit further concluded that the only way the Trustee could satisfy his burden of proof was to prove that the Funds at the time of the seizure were derived from legitimate business operations, as opposed to being derived from Foley's criminal scheme. App.4-5.[1]

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[1] In a footnote, the Eleventh Circuit stated that, at oral argument, the Trustee argued for the first time that it had no opportunity to prove its case in the district court. App.5, fn.2. The Eleventh Circuit, therefore, concluded that because this argument was not fairly presented in the initial brief, it declined to entertain the argument. Id. The Eleventh Circuit, however, either misunderstood or overlooked the Trustee's argument regarding due process. Throughout his briefs, the Trustee argues that the *result* of the district court's order granting the USA's motion to dismiss is that he was being deprived of his property without due process. The result was created by the district court's legal error relative to the Trustee's standing. In. Br. in USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), Eleventh Circuit Court of Appeals, Case No. 06-12715 at p. 23-37 (the allegations of the Verified Claim required the district court to either grant the Trustee's summary judgment motion, or at minimum hold an evidentiary hearing on the Verified Claim. The district court failed to do either and as a result sanctioned an unconstitutional taking of Global's property.); see also Reply Br. in USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), Eleventh Circuit Court of Appeals, Case No. 06-12715 at p. 12 (just because the Funds were preliminarily forfeited does not create an irrebutable presumption that they are criminal proceeds. To do so would be an unconstitutional deprivation of property without due process. Under the Government's theory, all forfeited property is irrebuttably presumed to be criminal proceeds and all third party claimants therefore have no standing. So when does the Estate get its day in court? Under the Government's theory, never! This reasoning flies in the face of logic as well as basic due process.); p. 13-14 (Because forfeitures

(continued...)

However, the Eleventh Circuit failed to deal with the narrow issue before it: was dismissal of the Verified Claim proper when the Verified Claim on its face, contained the factual averments necessary to support the relief requested. Said otherwise, the Trustee was prohibited from putting forward any evidence to prove the allegations in the Verified Claim. Thus, the Eleventh Circuit's ruling condones the unconstitutional taking of improperly forfeited property. Because the issue here involves an unconstitutional taking without due process in direct contradiction of the U.S. Constitution, the Eleventh Circuit's ruling is unconstitutional on its face and therefore must be reversed.

(...continued)
are disfavored, see U.S. v. One Ford Coach, 307 U.S. 219, 226 (1939), forfeiture laws are "strictly construed . . . against the government," U.S. v. Marolf, 173 F.3d 1213, 1217 (9th Cir. 1999). It is the draconian nature of forfeiture that imposes on the Government the heavy burden of tracing forfeited property. Any less of a burden would lead to an unconstitutional taking.). In other words, because the district court summarily dismissed the Trustee's claim, irrespective of the fact that the Special Verdict did not properly identify the account to be forfeited, the result of the district court's order was that the Trustee was denied due process of law. Further, although the Trustee believes he properly raised the due process issue in his briefs, the Trustee submits that a court of appeals has discretion under Federal Rule of Criminal Procedure 52(b) to correct "plain errors or defects affecting substantial rights" that were forfeited because not timely raised in the lower court, which it should exercise only if the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." See U.S. v. Atkinson, 297 U.S. 157, 160 (1936). The Eleventh Circuit's failure to deal with the patent violation of the Trustee's due process rights should not be condoned.

OPINION BELOW

The opinion of the Eleventh Circuit is unreported. The District Court's forfeiture judgment against petitioner is also unreported.

JURISDICTION OF THIS COURT

Judgment was entered by the Eleventh Circuit on October 10, 2007. Rehearing by panel and rehearing *en banc* were denied on December 12, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

21 U.S.C. § 853

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law —

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in

addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the

defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that —

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing

when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit. —

(A) In general. — Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply. — Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory perfor-

mance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisionsExcept to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any desig-

nated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional

facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a) of this section, as a result of any act or omission of the defendant —

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter III of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall —

(1) order restitution as provided in sections 3612 and 3664 of title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.

STATEMENT OF THE CASE

The USA began a criminal prosecution and related forfeiture proceedings against Foley, his wife, Denise, and his sister, Paula (collectively, "the Foleys"). Prior to his arrest, Foley served as Global's president. After the USA commenced its prosecution of the Foleys, certain creditors initiated an involuntary bankruptcy proceeding against Global pursuant to Chapter 7 of the Bankruptcy Code. Global was not a defendant in the USA's criminal action against the Foleys.

In connection with the Foleys' prosecution, the USA seized, among other things, the Funds from a Union Bank of Florida account belonging solely to Global. Those facts are undisputed. On behalf of Global's bankruptcy estate, the Trustee timely filed a Verified

Claim pursuant to 21 U.S.C. § 853(n)(6). App.10-13. The Verified Claim specifically alleged that "[t]he Estate is the owner of . . . $1,106,615.58 . . . seized from Union Bank of Florida, account number 285539 in the name of Global Vending, Inc." Id. Further, the Trustee alleged that Global "received the Funds as part and parcel of a legitimate, ongoing business concern and said Funds were deposited in the predecessor to the Estate's bank account at the time of the improper seizure." Id. As a result, the Trustee concluded that "[t]he Estate has a superior interest in the identified Funds superior to that of any person or entity including, but not limited to the United States of America." Id.

Paula and Denise pled guilty, while Foley proceeded to trial. While acquitting Foley of some of the charges, the jury also convicted Foley of two counts of mail fraud and eleven counts of money laundering. Additionally, the jury returned a special verdict on forfeiture (the "Special Verdict"). App.14-25. In the Special Verdict, the jury found:

> We, the Jury, unanimously find, by a preponderance of the evidence, the defendant's interest in this property is subject to forfeiture to the United States as property constituting, or derived from, any proceeds, directly or indirectly, as the result of the . . . mail fraud violations.
>
> b. "$1,106,615.58 in U.S. Currency seized from Union Bank of Florida account number 285539, in the names of "Thomas Foley, III" and "Denise Foley."

App.14-15.[2]

On September 7, 2005, the district court held a several hour long hearing at which it considered (1) the USA's motion to dismiss the Trustee's Verified Claim; and (2) the Trustee's motion to dismiss the USA's forfeiture claim relative to the Funds. At the close of that hearing, the district court denied both motions and expressed its concern that (1) the Special Verdict incorrectly identified the owner of the account from which the Funds were seized; and (2) stated "there is very little testimony in the criminal case as to how these proceeds came to be, where they came to be from." Because of the "sparse evidence presented in the criminal trial," the district court ruled that the Trustee "should have an opportunity to litigate that issue." The district court concluded, 'I believe [the Trustee and/or Global bankruptcy estate] have met their initial legal burden. Now it comes to mind to see whether or not they can meet that factually."

The district court concurrently authorized discovery requested by the Trustee in connection with the Verified Claim. Upon completing discovery, the Trustee filed a motion for summary judgment based on testimony provided by the USA's sole witness at the criminal trial relative to forfeiture – FBI Agent Douglas Williams ("Agent Williams"). In his sworn

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[2] The Special Verdict is clearly erroneous on its face and if deemed valid would be forfeiting an account that never existed. Foley and his wife were not the owners of the account from which the Funds were seized. This error alone is fatal to the USA's claim to the Funds because it confuses the very issue in question: who owned the Funds. All parties, including the district court, acknowledge the defect in the Special Verdict.

deposition testimony, Agent Williams testified that the Funds were not and could not be traced to Foley, or to any of his criminal acts.

While the Trustee's summary judgment motion was pending, the district court without notice and *sua sponte* reconsidered its previous order and dismissed the Verified Claim ruling that he lacked standing to assert such a claim on the Estate's behalf even though the Verified Claim states that the Estate is owner of the Funds. App.6-9.

Petitioner filed an appeal to the Eleventh Circuit Court of Appeals, arguing that the district court erred in dismissing the Verified Claim on the basis that the Trustee lacked standing. Petitioner argued that if allowed to stand, the district court's order of dismissal condoned the USA's seizure of a third-party's property without providing the requisite proof that such property was subject to lawful forfeiture and without allowing the production of evidence in support of the timely filed Verified Claim. In the absence of such proof and/or hearing, the resulting forfeiture is an absolute unconstitutional taking without due process

The Eleventh Circuit affirmed the district court's forfeiture judgment concluding that the Trustee had failed to meet his burden of proving by a preponderance of the evidence that the Funds, as of the time of their seizure by the FBI, were Funds of Global – *i.e.*, that Global's legal interest in the funds was superior to the USA's legal interest. App.3-5. However, in reaching this conclusion, the Eleventh Circuit missed the point raised by the Trustee on appeal – that dismissal of the Verified Claim was improper when

the Verified Claim on its face contained the factual averments necessary to support the relief requested and the Trustee was not permitted to present evidence to support his claim. As such the Eleventh Circuit's opinion violates the U.S. Constitution and binding precedent on the proper basis for dismissal of a complaint, and more importantly, results in an undoubtedly unconstitutional taking of property by the USA without due process of law. Said otherwise, how could the Trustee not carry his burden of proof – an evidentiary burden – if he was never allowed the present evidence?

REASONS FOR GRANTING THE WRIT

By affirming the district court's summary dismissal of the petitioner's statutorily Verified Claim of Ownership and Request for Ancillary Hearing, the appellate court ratified the unconstitutional taking of a third parties' interest in property without allowing the petitioner to present evidence that that the property was not subject to forfeiture, thereby violating the U.S. Constitution's guarantee of due process of law and violated well established, binding precedent.

In an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause. U.S. v. James Daniel Good Real Prop., 510 U.S. 43, 48-62 (1993); Fuentes v. Shevin, 407 U.S. 67, 80 (1972). In that regard, 21 U.S.C. Section 853(n) provides that third parties are given the opportunity to overcome an

otherwise valid preliminary order of forfeiture by proving, *inter alia*, that they have an interest in the forfeited property superior in right to the defendant's interest, if any. 21 U.S.C. §853(n)(6)(A). Further, Federal Rule of Criminal Procedure Rule 32.2(c)(1)(A) states "In the ancillary proceeding, the court may, on motion, dismiss the motion for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true." See also U.S. v. Serendensky, 393 F.3d 348, 352 (2d Cir. 2004) ("explaining that under Rule 32.2, when a third party files a petition asserting an interest in property to be forfeited, the court must conduct an 'ancillary proceeding'. That ancillary proceeding, although occurring in the context of a criminal forfeiture, closely resembles a civil action: (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.").

The district court and the Eleventh Circuit failed to recognize that the Trustee carried his burden of pleading by alleging in the Verified Claim, that "[t]he Estate is the owner of . . . $1,106,615.58 . . . seized from Union Bank of Florida, account number 285539 in the name of Global Vending, Inc." App.10-13.[3] At

[3] Clearly, the titled owner of a bank account is presumptively the owner of the funds in that account. See, e.g., Westgate Vacation Villas, Ltd. v. Tabas (In re: Int'l. Pharmacy & Disc. II, Inc.), 158 Fed. Appx. 256 (11th Cir. 2005) (citing Nat'l Bank of Ga. v. Kennesaw Life and Accident Ins. Co., 800 F.2d 1542, 1545

(continued...)

the stage in which the claim was dismissed – on a motion to dismiss – the court was required to accept the Trustee's allegations in the Verified Claim as true. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993); See Grossman v. NationsBank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (the scope of the review of a motion to dismiss must be limited to the four corners of the complaint); St. George v. Pinellas County, 285 F.2d 1334, 1337 (11th Cir. 2002) (While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing the grant of a motion to dismiss, we are required to accept the allegations in the complaint as true); U.S. v. Lee, 2006 WL 2927245 at *3 (D. Ore. Oct. 10, 2006) (citing Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)); See also Marsh v. Butler County, 268 F.3d 1014, 1023 (11th Cir. 2001) (en banc) (in considering a motion to dismiss, the court must "[a]ccept all well-pleaded factual allegations (with reasonable inferences drawn favorably to plaintiffs) in the complaint as true"). Thus, the district court was required to assume as true the allegations that (1) the Estate is the owner of the Funds; (2) Global received the Funds as part and parcel of a legitimate, ongoing business concern and said Funds were deposited in the predecessor to the Estate's bank account at the time of the improper seizure; and (3) the Estate has a superior interest in the Funds superior to that of any person or entity including, but not limited to, the USA. App.10-13.

(...continued)
(11th Cir. 1986). The USA never attempted to rebut these legal presumptions.

Both the district court and the Eleventh Circuit completely ignore the allegations in the Verified Claim and black letter law on dismissal. The result of this legal error is the deprivation of the Estate's property without due process of law.

Based upon the plethora of applicable law that *mandates* that a court accept the well-pled factual allegations of a complaint as true when considering a motion to dismiss, the district court and the Eleventh Circuit erroneously found that the Trustee failed to meet an evidentiary burden – the burden of proof. That finding is a *non sequitor*. However, at the stage of a motion to dismiss, the Trustee's sworn statements in the Verified Claim were legally sufficient to meet the applicable burden and survive dismissal. Thus, reversal of the Eleventh Circuit decision affirming the district court's order granting the USA's motion to dismiss is required.

b. The Additional Evidence

Notwithstanding the fact that the Trustee's statements in the Verified Claim were sufficient to meet the applicable burden on a motion to dismiss, contrary to the conclusions reached by the Eleventh Circuit, the Trustee provided unrebutted evidence that the Funds could not be forfeited. Contrary to the Eleventh Circuit's assertion that the "Trustee makes the conclusory assertion that $80-90,000, per month of legitimate income was generated from the ATM machines and this income was 'legitimate'", this assertion was supported by the deposition testimony of the USA's only witness, Agent Williams on its

initial forfeiture case. Agent Williams testified that upon review of Global's bank statements, he determined that Global functioned as a **legitimate** business generating between $80,000-$90,000 per month in revenue from its ATM machines.[4] Thus, not only was the Eleventh Circuit incorrect in failing to attribute critical legal significance to the statements in the Verified Claim, it was also incorrect in ruling that if given an evidentiary hearing, the Trustee could not produce evidence of the legitimacy of the Funds. The only evidence was had required return of the Funds to the Trustee. In fact, the sworn testimony of Agent Williams is the only evidence adduced from the USA at the forfeiture portion of Foley's criminal trial and proves the Eleventh Circuit's decision erroneous. Agent Williams' admissions during his deposition are fatal to the USA's claim to the Funds.

Based upon these errors, this Court should issue a Writ of Certiorari, thereafter reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and order the district court to hold an evidentiary hearing on the Trustee's Verified Claim.

II. The Special Jury Verdict on Forfeiture

In reaching its decision to affirm the district court's order forfeiting the Funds, the Eleventh Circuit also failed to recognize or even acknowledge the significance of the fundamental and fatal error contained in

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[4] The transcript of Agent Williams' deposition can be found at docket entry 402 in USA v. Thomas Foley III, Leslie S. Osborne (Interested Party), U.S. Dist. Ct., So. Dist. of Fla., Case No. 04-60107-CR-MGC. The relevant pages are 23, 25, 31, 46, 49-50

the Special Verdict directly related to the critical issue of the Funds' ownership. App.14-25. As acknowledged by the district court and the USA, the Special Verdict erroneously identified Foley and his wife as the owners of the account, when in fact, the account's sole owner was Global. App.15. Indeed, the district court partially based its original denial of the USA's motion to dismiss the Verified Claim on this very deficiency. Given the Special Verdict is flawed and thus void on this issue, the Funds are by definition still owned by Global and/or the Estate. Said otherwise the USA failed in its burden to prove its initial forfeiture case. Thus, as a matter of law, the underlying forfeiture of the Funds was never legally established and the USA could not use the Special Verdict as the basis for its claim to the Funds since the Special Verdict identified the wrong account-owner.

This is especially critical in this matter because the USA's error on the Special Verdict form that the USA has acknowledged is its error voids that finding and the burden of proof never shifts to the Trustee. The USA's burden is very specific and very high in this context. See U.S. v. Gilbert, 244 F.3d 888 (11th Cir. 2001).[5] Finally, the Special Verdict directly related to the Funds is wrong.

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[5] Gilbert requires the USA prove that Foley had an interest in the Funds or that the Funds were the proceeds of his criminal scheme. Gilbert, 244 F.3d 888. Further, Gilbert requires that the jury be asked to find the extent of the defendant's or the other co-defendants' ownership interest in the forfeited property. Id. at 900. Because the USA in Gilbert, like the USA in this case, failed to do so at the trial level, the Eleventh Circuit found that the Gilbert jury could not legally forfeit all assets. Id. A similar result is required in the instant matter.

Thus, as in Gilbert, the jurors in Foley's trial were presented with a defective Special Verdict that purported to forfeit his "interest in the property alleged in the criminal forfeiture count of the Third Superseding Indictment." Yet, as in Gilbert, the Special Verdict did not require, direct, or even permit the jurors to make a finding as to Foley's interest the seized assets, including the Funds. To the contrary, the Special Verdict merely directed the jurors to determine whether each asset was subject to forfeiture. It also directed the jury in an incorrect direction. An affirmative response, based on the Special Verdict, resulted in a complete forfeiture of the Funds, rather than Foley's specified interest, if any. The flawed Special Verdict also pointed the jury in the wrong direction on the crux of the issue who owned the bank account and Funds therein. Based upon these significant errors, and the critical fact that the district court failed to allow the Trustee to present evidence to support his claim to the Funds, this Court should issue a Writ of Certiorari and thereafter reverse the judgment of the United States Court of Appeals for the Eleventh Circuit in order to prevent the unconstitutional taking of th Trustee's property.

CONCLUSION

Petitioner, LESLIE S. OSBORNE, as Trustee for the Bankruptcy Estate of Global Vending, Inc., respectfully submits that the Eleventh Circuit's decision directly contradicts settled law on (i) standard for summary dismissal of a claim; (ii) the due process rights of a third-party to challenge an improper

forfeiture; and (ii) countenances the forfeiture of third-party property even though there is an invalid verdict finding directly contrary. Thus, the Eleventh Circuit's decision should be reversed.

For each and all the foregoing reasons, Petitioner, LESLIE S. OSBORNE, as Trustee for the Bankruptcy Estate of Global Vending, Inc., respectfully requests that this Court issue a Writ of Certiorari and thereafter reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

LESLIE S. OSBORNE, as Trustee for the Bankruptcy Estate of Global Vending, Inc.

By: _____

One of his attorneys

Phillip M. Hudson III
Hilda Piloto
ARNSTEIN & LEHR LLP
200 S. Biscayne Blvd., Suite 3600
Miami, Florida 33131
(305)374-3330

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-12715-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS J. FOLEY, a.k.a. Thomas Richards,
Defendant,

LESLIE S. OSBORNE,
Interested Party-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: ANDERSON and PRYOR, Circuit Judges, and VINING,* District Judge.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM :

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/UNITED STATES CIRCUIT JUDGE

*Honorable Robert L. Vining, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

ORD-42

(12101)

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-12715-EE

D. C. Docket No. 04-60107 CR-MGC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS J. FOLEY, a.k.a. Thomas Richards,

Defendant,

LESLIE S. OSBORNE,

Interested Party-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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(October 10, 2007)

Before ANDERSON and PRYOR, Circuit Judges, and VINING,* District Judge.

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*Honorable Robert L. Vining, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. The statute is clear that the trustee has the burden of proving by a preponderance of the evidence that the funds in the Union Bank account as of the time of its seizure by the FBI were funds of Global - i.e., that Global's legal interest in the funds was superior to the legal interest of the government. 21 U.S.C. §3853(n)(6)(A). Notwithstanding the trustee's burden of proof, its argument in its brief on appeal relies entirely upon the assertion that the government has failed to trace the funds in the account as of that time to defendant Foley's criminal fraud. In other words, the trustee's argument is that the government has failed to prove that the funds were proceeds of the crime. Of course, if the funds in the account were proceeds of the crime, the Government's interest would prevail. Thus, the flaw in the trnstee's argument on appeal is its failure to recognize that it, and not the government, bears the burden of proof.[1]

We have carefully examined the record on appeal. We readily conclude that the trustee has failed to carry its burden of proof. The only way the trustee could satisfy its burden of proof is by proving that the funds in the account as of the time of the FBI seizure

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[1] Although the district court clearly placed the burden of proof on the trustee, the trustee in its brief on appeal does not straightforwardly challenge that placement, and certainly advances no legal argument that the district court erred in this regard.

were derived from legitimate business operations, as opposed to having been derived from Foley's criminal activity. Although the trustee makes the conclusory assertion that $80-$90,000 per month of legitimate income was generated from the ATM machines and that this income was "legitimate," the trustee wholly failed to prove that such funds were in fact legitimate. Indeed, the record suggests that such "earnings" were part of the criminal scheme in which Foley fraudulently assigned multiple investors to a single machine. The record contains no evidence of any persuasive attempt by the trustee to prove that the monthly earnings from the machines were in fact legitimate, or otherwise prove that the funds in the account as of the time of the FBI seizure were legitimate.[2]

Accordingly, the judgment of the district court is

AFFIRMED.

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[2] At oral argument, the trustee argued for the first time that it had no opportunity to prove its case in the district court. However, this argument was not fairly presented in the trustee's initial brief on appeal. We decline to entertain an argument raised for the first time at oral argument.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 04-CR-60107-COOKE/BROWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS FOLEY,

a/k/a "Thomas Riehards"

Defendant.

ORDER GRANTING THE UNITED STATES' MOTION TO DISMISS

THIS CAUSE came before the Court upon T~e United States of America's Motion to Dismiss the Verified Claim of Leslie Osborne, Chapter 7 Trustee for the Estate of Global Vending, Inc., **[D,E. 299]**, filed July 12, 2005. The Court having reviewed the fully briefed motion and being otherwise advised of the premises, it is hereby,

ORDERED AND ADJUDGED that the United States' motion is GRANTED.

Under 21 U.S.C. § 853(n)(6)(A), a third-party petitioner may assert an interest in forfeited property in

either of two WayS. He may demonstrate that (1) he "has a legal right, title, or interest in the property... [that] was vested in [him] rather than the [criminal] defendant or was superior to any right, title, or interest of the defendant at the time of the commission oftha acts which gave rise to the forfeiture of the property under this section, id. § 853(n)(6)(A); or (2) he "is a bona fide purchaser for value of the right, title, or interest of the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section," id. § 853(n)(6)(B). A "legal interest in property" encompasses "all legally protected fights, claims, titles, or shares in real or personal property." United States v. Reckraeyer, 836 F.2d 200, 205 (4th Cir, 1987). As such, a petitioner only may succeed in his claim against forfeited property if he can demonstrate that he had such a "legal interest" in the property at the time it was forfeited and that his interest "exist[ed] in the property subject 1o the forfeiture." ld. The Trustee avers that the estate's "interest" derives from the filing of the bankruptcy petition. The filing of a bankruptcy petition does not, however, create the requisite "legal interest" in the subject property. In re Thomas, 883 F.2d 991,995 (1 lh Cir. 1989), cert. denied, 497 U.S. 1007 (1990). Whatever interest the estate had in the subject property prier to the filing of the bankruptcy petition remains the same. The filing of the bankruptcy petition does not create a "legal interest", as contemplated by the statute.

Moreover, under the relation back doctrine, the government acquires its interest in the defendant's forfeited properly at the time of the commission of the

criminal acts giving rise to the forfeiture. See 21 U.S.C. §853(c). As such, if a third party's interest in the forfeited property at the time of the criminal acts was superior to the criminal defendant's interest, then the interest that the governmant acquires is subordinate to that of the third party. *United States v. Lanvin*, 942 F.2d 177, 185 (3d Cir; 1991). The estate in the involuntmy bankruptcy case was created June 30, 2004. The subject property was seized by the Government, on January 15, 2004. In order to have a legal interest in the subject property, the estate's legal interest must have existed at the time the crime occurred, pursuant to 21 U.S.C. §853(c). It did not. This presents an insurmountable problem for the estate beeanse the fraud proceeds cannot exist before the commission of the underlying offense and as such, Section 853(n)(6)(A), cannot be used to challenge this forfeiture. See *United States v. McCorkle*, 143 F.Supp.2d 1311, 1331 (M.D. Fla.2001)(bank's right of set off against depositor's funds could not be asserted under Section 853(n)(6)(A) because at the time the right to set off came into existence, the proceeds were already forfeitable to the government). Because the Trustee has been unable to demonstrate a legal interest in the subject property or that the estate had superior right, tide, or interests, the Trustee for the estate has no standing to assert a right to fraud proceeds, therefore the petition must be dismissed.

DONE AND ORDERED in chambers in Miami, Florida, this 20 day of April, 2006.

THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT COURT JUDGE

cc:

All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-60107-CR-Cooke\Brown

UNITED STATES OF AMERICA	)
	)
Plaintiff,	)
	)
	)
	)
THOMAS FOLEY,	)
a/k/a "Thomas Richards"	)
	)
Defendant.	)

VERIFIED CLAIM OF OWNERSHIP AND REQUEST FOR ANCILLARY EVIDENTIARY HEARING

Claimant, LESLIE S. OSBORNE, not individually, but as Chapter 11 Trustee for the Estate of Global Vending, Inc., ("the Estate") who after being duly sworn, deposes and swears to the following claim of ownership, pursuant to 21 U.S.C. §853(n), and any other applicable rule and/or statute:

1. The Estate is the owner of the following property pursuant to inter alia 11 U.S.C. §511:

> **$1,106,615.58 in US Currency seized from Union Bank of Florida, account number 285539 in the name if Global**

Vending, Inc. (the "Funds).

The Funds have been forfeited pursuant to a preliminary order of forfeiture dated February 24, 2005.

(D.E. 222).

2. Claimant received the Funds as part and parcel of a legitimate, ongoing business concern and said Funds were deposited in the predecessor to the Estate's bank account at the time of the improper seizure.

3. As a result, the Estate's interest in the Funds is that of iheir owner which interest supports the demand for its return and right to pursue this instant action. The Estate has a superior interest in the identified Funds superior to that of any person or entity including, but not limited to the United States of America.

4. As a result of the Estate's ownership interest in the Funds and the fact that said Funds were improperly seized, I have a right to make a claim to said Funds and formally demand its return, deny any wrongdoing in this action and, in the event that such wrongdoing did actually take place, assert the Estate's status as an innocent owner of the Funds. The Estate's superior interest in the Funds is presumed and such presumption is unrebutted

5. Pursuant to Federal Rule of Criminal Procedure 32.3.(c), and any other applicable rule and/or statute, I request an ancillary hearing to determine the Estate's legal interest as the rightful owner of the property identified above.

FURTHER AFFIANT SAYETH NOT.

/S/ LESLIE S. OSBOURNE

STATE OF FLORIDA)
)ss
COUNTY OF MIAMI-DADE)

SWORN TO and SUBSCRIBED before me by Leslie S. Osbome, this 29th day of March, 2005. The.subject (__) produced identification in the form of _____ or (X) is personally known to me.

/s/ Notary Public
State of Florida at Large

Respectfully submitted,

ARNSTEIN & LEHR LLP
Attorneys for Claimant
201 S. Biscayne Blvd., Suite 400
Miami, FL 33131
Tel: 305-357-2003
Fax: 305-374-4744

/s/ PHILLIP M. HUDSON, III

Florida Bar No.: 518743
pmhudson@arnstein.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Regular Mail this _ day of March 2005 to: Scott Sakin, Esq., 1411 N.W. North River Drive, Miami, Florida 33125; Jeffrey Harris, Esq., 1 E. Broward Boulevard, Suite 925, Fort Lauderdale, Florida, 33301-1804; Barry Greff, Esq., 1112 Weston Road, Suite 207, Weston, Florida 33326-1915; Bruce Reinhart, U.S. Attorney's Office, Southern District of Florida, 500 S. Australian Avenue, Suite 400, West Palm Beach, 33401; Gerardo Simms, United States Attomey's Office, Southern District of Florida, 99 NE 4th Street, Miami, Florida 33132; and Heidi A. Feinman, U.S. Trustee's Office, 51 SW First Avenue, Suite 1204, Miami, FL 33130.

By:

_____

/s/ Phillip M. Hudson, III

Florida Bar No. 518743
ARNSTEIN & LEHR LLP
Attorneys for Trustee,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60107-CR-COOKE

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS J. FOLEY, III

Defendant.

SPECIAL JURY VERDICT ON FORFEITURE

1. We, the Jury, having found defendant Thomas J. Foley, III, guilty of Counts 1, 2, 9-19, return the following Special Verdict as to the defendant's interest in the property alleged in the criminal forfeiture count of the Third Superseding Indictment:

A monetary judgment in the sum of $13.549.876.03, representing the amount of proceeds obtained by defendant, directly or indirectly, as a result of the wire fraud and/or mail fraud violations.

YES___NO X

Only if you answer "NO" above, fill in the statement below with the amount you find.

We, the jury, unanimously find by a preponderance of the evidence that $2,000,000 in United States currency was the amount of the proceeds obtained by

defendant, directly or indirectly from the wire fraud and/or mail fraud violation(s).

2. We, the Jury, unanimously find, by a preponderance of the evidence, the defendant's interest in this property is subject to forfeiture to the United States as property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of the mail fraud violations.

a. $562,750.44 in U.S. Currency seized from Union Bank of Florida account number 286584, in the names of"Thomas Foley, III" and "Denise Foley",

YES___ NO X

b. $1,106,615.58 in U.S. Currency seized from Union Bank of Florida account number 285539, in the names of"Thomas Fpley, III" and "Denise Foley",

YES X NO ___

c. $5,172.51 in U.S. Currency seized from Bank United account number 0263009947, in the name of "Denise Foley and Thomas Foley".

YES ___ NO X

d. $55,570.46 in U.S. Cm'rency seized from Metrobank of Dade County account number 2500002379, in the name of "Global ATM, Inc.".

YES ___ NO X

e. $24,706.90 in U.S. Currency seized from Horizon Bank account number 170166, in the name of "Denise Foley or Thomas J. Foley".

YES ___ NO X

f. $16,761.10 in U.S. Currency seized from Horizon Bank account number 170157, in the name of "Denise Foley or Thomas J. Foley".

YES ___ NO X

g. $18,333.50 in U.S. Currency seized from StmTrust account number 100018577584, in the name of Terminal Cash Solutions.

YES X NO ___

h. $40,000 in U.S. Currency represented by Bank United cashier's check number 148296826.

YES ___ NO X

i. $40,000 in U.S. Currency represented by Bank United cashier's check number 148296827.

YES ___ NO X

j. $58,175 in U.S. Currency.

YES ___ NO X

k. All that lot or parcel of land, together with its

buildings, improvements, fixtures, attachments and easements located at 6225 Stallion Way, Southwest Ranches, Broward County, Florida, 33330, and more particularly described as: Lot 3, of Landmark at Sterling Ranches, according to the Plat thereof, as recorded in Plat Book 170, Page 14, of the Public Records of Broward County, Florida.

YES X NO ___

1. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements located at 3912 Cherry Lane, Weston, Broward County, Florida, 33332, and more particularly described as: Building 52, Unit 1, Courtyard Homes. A portion of Tract 33, Sectors 8, 9 and 10 Plat, according to the Plat thereof, as recorded in Plat Book 161, at Page 3, of the Public Records of Broward County, Florida, and more particularly described as follows:

Commence at the Northeast comer of said Tract 33;

Thence South 76°21'00" West, for 2074.20 feet to the Point of Beginning;

Thence South 00°36'31" East, for 17.50 feet;

Thence South 89°23'29" West, along the prolongation and centerline of a partywall for 93.83 feet;

Thence North 00°36'31" West, for 17.50 feet;

Thence North 89°2Y29" East, for 41.16 feet;

Thence North 00°36'31" West, for 6.16 feet;

Thence North 89°23'29" East, for 17.33 feet;

Thence South 00°36'31" East, for 6.16 feet;

Thence North 89°23'29" East, for 35.34 feet to the Point of Beginning.

Said lands situate, lying and being in Broward County Florida.

YES ___ NO X

m. One (1) 2003 Mercedes Benz SS00V, Vehicle WDBSK74F43F056159 registered in the name of Thomas J. Foley III.

YES X NO ___

n. One (I) 2003 Mercedes Benz SL 55, Vehicle WDBSK74F43F056159 registered in the name of Thomas J. Foley, III.

YES ___ NO X

o. One (I) 2004 Cadillac Escalade, Vehicle Identification Number 3GYFK66N84G156907 re.gistered in the name of Thomas J. Foley, III.

YES X NO ___

p. One (1) 2004 Honda Rancher AT ATV, Vehicle Identification Number 478TE290344006217.

YES X NO ___

q. One (1) 2004 Honda Rancher AT ATV, Vehicle Identification Number 478TE290044004229.

YES X NO ___

r. One (1) 2004 Honda CRF motorcycle, Vehicle Identification Number, 9C2ME09014R002549.

YES X NO ___

s. one (1) diamond and platinum engagement ring;

YES X NO ___

t. Oney(1) diamond and platinum "Eternity" style wedding ring;

YES ___ NO X

u. one (1) diamond and platinum straight line flexible link bracelet;

YES X NO ___

v. two (2) diamond and 14 karat white gold stud earrings.

YES ___ NO X

w. $150,000 deposited for Unit 3GPH50, also known as Middle PH, at 350 Las Olas Place Condominium, with Stiles Corporation and/or Barkley, Ltd.. and held

by their assigns and/or escrow agents.

NO

3. We, the Jury, unanimously find, by a preponderance of the evidence, the following defendant's interest in this property is subject to forfeiture to the United States as property involved in the money laundering violations and/or as property traceable to such property.

a. $562,750.44 in U.S. Currency seized from Union Bank of Florida account number 286584, in the names of "Thomas Foley, III" and "Denise Foley",

YES ___ NO X

b. $1,106,615.58 in U.S. Currency seized from Union Bank of Florida account number 285539, in the names of "Thomas Foley, fir' and "Denise Foley",

YES X NO ___

c. $5,172.51 in U.S. Currency seized from Bank United account number 0263009947, in the name of "Denise Foley and Thomas Foley".

YES ___ NO X

d. $55,570.46 in U.S. Currency seized from Metrobank of Dade County account number 2500002379, in the name of "Global ATM, Inc.".

YES ___ NO X

e. $24,706.90 in U.S. Currency seized from Horizon Bank account number 170166, in the name of "Denise Foley or Thomas.L Foley".

YES ___ NO X

f. $16,761.10 in U.S. Currency seized from Horizon Bank account number 170157,in the name of "Denise Foley or Thomas.L Foley".

YES ___ NO X

g. $18,333.50 in U.S. Currency seized from SunTrust account number 100018577584, in the name of Terminal Cash Solutions

YES X NO ___

h. $40,000 in U.S. Currency represented by Bank United cashier's check number

YES ___ NO X

i. $40,000 in U.S. Currency represented by Bank United cashier's check number 148229687.

YES ___ NO X

j. $58,175 in U.S. Currency.

YES ___ NO X

k. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements located at 6225 Stallion Way, Southwest Ranches, Broward Count3,, Florida, 33330, and more particularly described as: Lot 3, of Landmark at Sterling Ranches, according to the Plat thereof, as recorded in Plat Book 170, Page 14, of the Public Records of Broward County, Florida.

YES X NO ___

l. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements located at 3912 Cherry Lane, Weston, Broward County, Florida, 33332, and more particularly described as: Building 52, Unit 1, Courtyard Homes. A portion of Tract 33, Sectors 8, 9 and 10 Plat, according to the Plat thereof, as recorded in Plat Book 161, at Page 3, of the Public Records of Broward County, Florida, and more particularly described as follows:

Commence at the Northeast comer of said Tract 33;

Thence South 76°21'00" West, for 2074.20 feet to the Point of Beginning;

Thence South 00°36'31" East, for 17.50 feet;

Thence South 89°23'29" West, along the prolongation and centerline of a partywall for 93.83 feet;

Thence North 00°36'31" West, for 17.50 feet;

Thence North 89°23'29" East, for 41.16 feet;

Thence North 00°36'31" West, for 6.16 feet;

Thence North 89°23'29" East, for 17.33 feet;

Thence South 00°36'31" East, for 6.16 feet;

Thence North 89°23'29" East, for 35.34 feet to the Point ofnBeginning.

Said lands situate, lying and being in Broward Couniy Florida.

YES ___ NO X

m. One (1) 2003 Mercedes Benz S500V, Vehicle Identification Number WDBNG75J63A375576 registered in the name of Thomas J. Foley, III.

YES X NO ___

n. One (1) 2003 Mercedes Benz SL 55, WDBSK74F43F056159 registered in the name of Thomas J. Foley, III.

YES ___ NO X

o. One (I) 2004 Cadillac Escalade, Vehicle 3GYFK66N84G156907 registered in the name of Thomas J Foley, III.

YES X NO ___

p. One (I) 2004 Honda Rancher AT ATV, Vehicle Idemification Number 478TE290344006217.

YES X NO ___

q. One (I) 2004 Honda Rancher AT ATV, Vehicle Idemification Number 478TE290044004229.

YES X NO ___

r. One (l) 2004 Honda CRF motorcycle, Vehicle Identification Number 9C2ME09014R002549.

YES X NO ___

s. one (1) diamond and platinum engagement nng;

YES X NO ___

t. one (I) diamond and platinum "Eternity" style wedding ring;

YES ___ NO X

u. one (1) diamond and platinum straight line flexible link bracelet;

YES X NO ___

v. two (2) diamond and 14 karat white gold stud earrings.

YES ___ NO X

w. $150,000 deposited for Unit 3GPHS0, also known as Middle PH, at 350 Las Olas Place Condominium, with Stiles Corporation and/or Barkley, Ltd. and held

by their assigns and/or escrow agents.

YES ___ NO X

SO SAY WE ALL,

_____

/s/ FOREPERSON

Dated this 11 day of February, 2005.